

## ***Sia v Child & Adolescent Health Service (Princess Margaret Hospital)*** **[2015] WADC 56**

### Background

On 30 October 2014 the arbitration was heard by Arbitrator J Mengler.

The issue before the Arbitrator was whether the Respondent to the appeal (and Respondent to the arbitration) was liable to pay certain reasonable expenses of the Appellant pursuant to Sch 1 of the *Workers' Compensation and Injury Management Act 1981* (the Act). Specifically, those expenses comprised gym membership for a period 27 June 2013 to 26 June 2014, in the sum of \$1,008; chiropractic treatment from 24 April 2014 to 16 October 2014, in the sum of \$770; and physiotherapy/Pilates treatments from 31 July 2014 to 16 October 2014, in the sum of \$630.

After receiving evidence by way of reports and other material the Arbitrator determined that the Respondent should pay the physiotherapy and Pilates expenses incurred by the Applicant but not the gym and chiropractic expenses that were claimed.

The Arbitrator concluded his findings at [35] of his reasons in the following terms:

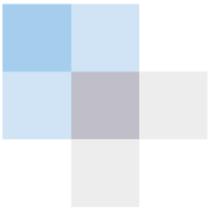
*"In my view the applicant has succeeded in her claim to a significant extent and, even though the monetary outcome is less than 50% of the quantum of her claim, I consider she should recover 50% of her legal costs and disbursements of her WorkCover WA proceedings."*

The issue to be determined was whether the Arbitrator erred in his discretion to award costs as he did.

### The Law

Section 264 of the Act provides for costs of parties in proceedings at WorkCover WA. The section confirms that costs are in the discretion of the relevant dispute resolution authority and the Arbitrator may determine by whom, to whom and to what extent costs are to be paid.

The normal rules as to costs apply and these are discerned from the provisions of O 66 *Rules of the Supreme Court 1971*. The relevant case law argues that the starting point in respect of costs is that they should follow the event with the successful party recovering his or her costs in the absence of special circumstances justifying some other order.



## The Appellant's position

The Appellant relied on *Oshlack v Richmond River Council* in that the discretion of the Arbitrator should have been exercised judicially in accordance with established principles. The Appellant relied on *Oshlack* to the effect that it confirms a successful party is entitled to an award of costs in its favour and the principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant.

The Appellant argued that there were no exceptional circumstances to warrant an order for only a portion of her costs to be awarded. The claims for expenses were not discrete or severable claims and they were brought as one claim and the Appellant was required to argue the case as a whole in relation to the expenses incurred by her which were dealt with in the same medical reports.

It was the Appellant's case that she was required to bring the application before WorkCover WA because the Respondent disputed the application in its entirety (not just the expense claims that were unsuccessful) and therefore she should be fully indemnified.

The Appellant noted in any event that no reasons or explanation were given as to how the Arbitrator came to a decision of a 50% portion of fees being recoverable.

## The Respondent's position

The Respondent argued that s 264 of the Act gives the Arbitrator discretion when making an order as to costs and in this case that's exactly what the Arbitrator did. The Respondent referred to *House v King* wherein an exercise of discretion is not easily overturned.

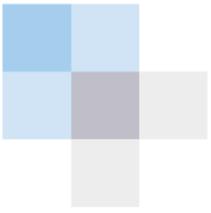
The Respondent argued that in substance the Appellant failed as she only succeeded in recovery of one item of expense to the value of \$630 out of a claim for three items the total of which was \$2,400. This being the case, the Respondent claimed that the starting point should be no order as to costs because the Appellant was unsuccessful to the extent of approximately three quarters of her claim.

The Respondent also argued that these were discrete claims made by the Appellant and should be treated as such. The Respondent raised the argument that had the Appellant conceded that only physiotherapy was necessary this might have been a case that could have been settled.

## Conclusion

In relation to the Appellant's argument that an appeal should be allowed on the basis that the Arbitrator did not give sufficient reason for only awarding 50% of her costs, the Judge made the following comments.





The purpose of giving reasons in a decision is so the losing party can identify whether there has been a mistake of fact or law. Fairness requires that a party should know why they have won or lost.

Reasons do not need to be lengthy or elaborate but the reasoning process leading to the result must be disclosed sufficiently to detail how this result was achieved. If no reasons are given in a decision or reasons are inadequate an Appeal Court will intervene as to give rise to a miscarriage of justice.

It is clear that when assessing the adequacy of reasons the reasons must be read as a whole and regard must be had to any findings that can be inferred.

The Judge confirmed that paragraph 35 of the Arbitrator's decision does not itself describe the reasoning of the Arbitrator for allowing only 50% of the Appellant's costs. The Judge opines that it appears from the material available to the Court that the claim for expenses was a "rolled up" claim for reasonable expenses incurred. The Arbitrator needed to identify what it was about the "rolled up" claim that would deprive the Appellant of 50% of her costs.

When looking at the Arbitrator's decision as a whole however it appeared that the Appellant had only reasonably incurred these costs up to a certain point. The medical reports suggested that of the treatments incurred, only the physiotherapy and Pilates would be of benefit to the Appellant. The Judge inferred from the decision that the Arbitrator was of the view that the claim for physiotherapy/Pilates was really all that was open to the Appellant at that time although it is too speculative whether if the Appellant had only proceeded on the basis of the physio claim whether it would have been possible to settle. The Judge found that taking into account all of the Arbitrator's reasons it was clear why he felt only 50% of the Appellant's fees should be awarded and this ground of appeal failed.

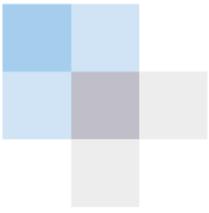
The Judge then turned to the question of whether the Arbitrator used his discretion in awarding costs correctly as per section 264 of the Act.

The Judge did not accept the Respondent's argument that the starting point in the claim should be that the Appellant receives no costs because she was largely unsuccessful. The Judge opined that to some extent it flies in the face of the findings of the Arbitrator as she was in fact successful to some extent.

In looking at whether the Arbitrator's discretion was used appropriately the appellate Judge must look at whether there has been an error made in the exercise of the discretion. If the Arbitrator has acted on the wrong principle, allowed irrelevant matters to guide them, if a mistake of fact has been made or relevant material has not been taken into account then the determination should be reviewed by an appellate Court. The exercise of the discretion needs to be reviewed on the ground that a substantial wrong has occurred and not whether the appellate Judge considers they would have taken a different view if in the position of the primary Judge.

The general principles as to costs should apply in that the successful party should recover their costs in the absence of special circumstances justifying some other order. It is argued that the





Appellant was required to bring the application as the Respondent disputed the application in its entirety (not just the unsuccessful claims) and in this case the Appellant should therefore be fully indemnified in respect of her costs.

In *Bowen v Aslanto Nominees* the Court of Appeal stated that an unsuccessful party had to satisfy the Court that there are good reasons why it should not pay the other party's costs. A Court can order a successful party to recover only a portion of its costs where the party had been unsuccessful in respect of certain discrete matters. However, this is not to be done as a matter of course as an attempt to isolate each issue and analyse it would likely add uncertainty and complexity to the outcome of the litigation. If the question of costs was dependent on the success of each particular issue in a matter then claimants may be dissuaded from canvassing all issues which might be material to the decision in the case and justice may not be served.

It was speculative to suggest that had the Appellant limited her claim to the expense for physiotherapy/Pilates a settlement might have been achieved. The question arises whether the Appellant should be deprived of costs because she was unsuccessful on two of the three issues. The Judge believed they were not discrete issues in the strict sense of the word. They were all expenses that arose from her injury and were all matters dealt with by the reviewing and treating doctors. In essence it was a rolled up claim for reasonable treatment expenses claimed by the Appellant. The Respondent refused to pay all or any of the expense claims and it became necessary for the Appellant to commence proceedings by way of arbitration. There was also no evidence to show that the failed issues increased the costs in the case.

In light of the above, the Judge found that this matter is one in which the general rule that a successful party will be entitled to costs should be followed. Only succeeding on part of the claim does not automatically disentitle a party to costs. In the circumstances the Judge found that the Arbitrator did err in his exercise of discretion and ordered the Respondent to pay all of the Appellants costs incurred in the WorkCover proceedings.

For more information on this article, please contact:

Ruth Slater  
Partner  
Email: [ruth.slater@hbalegal.com](mailto:ruth.slater@hbalegal.com)  
Direct Line: (08) 9265 6014

Rebecca Pope  
Senior Associate  
Email: [Rebecca.pope@hbalegal.com](mailto:Rebecca.pope@hbalegal.com)  
Direct Line: (08) 9265 6015

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